Supreme Court of the State of Washington

Opinion Information Sheet

Docket Number: 80195-9

Title of Case: State v. Quismundo

File Date: 09/11/2008

Oral Argument Date: 05/13/2008

SOURCE OF APPEAL

Appeal from Snohomish County Superior Court

05-1-01390-1

Honorable Ronald X Castleberry

JUSTICES

Gerry L. Alexander Signed Majority

Charles W. Johnson Signed Majority

Barbara A. Madsen Signed Majority

Richard B. Sanders Signed Majority

Tom Chambers Signed Majority

Susan Owens Signed Majority

Mary E. Fairhurst Signed Majority

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

NO. 80195-9

Respondent,

v. EN BANC

RONALD STEVEN QUISMUNDO,

Filed September 11, 2008

Petitioner.

STEPHENS, J. -- Petitioner Ronald Steven Quismundo appeals his conviction for felony violation of a no-contact order. After the State rested its case in chief, the

defense moved to dismiss the charge based on an insufficient information, pointing out that the charging document failed to allege that Quismundo actually violated the order. The trial court allowed the State to reopen its case and amend the information. Under State v. Vangerpen, 125 Wn.2d 782, 888 P.2d 1177 (1995), this was an improper remedy for an insufficient charging document, and the trial court should have dismissed the case without prejudice. We reverse the Court of Appeals

and remand this case to the trial court for dismissal without prejudice.1

I

Fact and Procedural History

Quismundo was charged by information on June 3, 2005 with violation of a no-contact order. He had previously violated separate no-contact orders concerning

the same party on two different occasions. The June 3 information charged the crime in two alternatives: (1) a felony violation predicated on assault or (2) a felony violation predicated on the two previous violations of a no-contact order. The trial started on August 22, 2005. On the first day of trial, before the jury was empanelled, the State amended the information to exclude the assault alternative, focusing instead on the previous violations alternative (first amended information).

After the State rested its case in chief, Quismundo moved for dismissal, noting that the first amended information lacked an essential element of the crime -- that Quismundo had indeed violated a no-contact order. Apparently, when the State deleted the assault alternative, it also inadvertently deleted the phrase concerning the violation of the orders. Quismundo argued that the appropriate remedy for the insufficient charging document was dismissal with prejudice.

The State conceded that the first amended information was insufficient. The State disagreed, however, that the appropriate remedy was dismissal with prejudice. The State asserted that the trial court had three options: (1) it could allow the State to reopen its case to amend the information, (2) it could dismiss without prejudice, or (3) it could proceed on the defective information. The State advocated for the first option as the "most expeditious and appropriate response." Report of Proceedings (RP) at 87.

The trial court ruled in favor of the State, allowing it to reopen its case in

1 Quismundo also argues that the second amended information itself is insufficient. Because we reverse Quismundo's conviction based upon the trial court's error in allowing the State to belatedly amend the information, we do not reach this issue.

chief and amend the information. Citing Criminal Rule 2.1, the trial court explained that Quismundo had shown no prejudice, surprise, or hindrance to his defense as a result of the insufficient information. Had he done so, the court explained, it might have granted a motion to dismiss without prejudice.

In response, Quismundo asked for a lengthy continuance, which the State claimed amounted to a motion for mistrial. The trial court agreed the continuance request was akin to a motion for a mistrial but was inclined to grant the continuance motion and set a trial date on the second amended information at a later date. However, upon reflection, Quismundo decided to proceed under the second amended information, apparently believing a mistrial might negate his right to appeal the court's denial of his motion to dismiss with prejudice.

On August 23, a second amended information was filed charging Quismundo

with felony violation of a no-contact order and stating that he "did violate the orders" (second amended information). Clerk's Papers at 48. Quismundo was convicted of the crime. The Court of Appeals affirmed the conviction in an unpublished opinion, explaining that because Quismundo requested an improper

remedy (dismissal with prejudice), the trial court did not abuse its discretion. State v. Quismundo, noted at 137 Wn. App. 1054, 2007 Wash. App. LEXIS 576, at *4-5.

Quismundo petitioned for review, which we granted at 162 Wn.2d 1018 (2008).

II

Analysis

In his supplemental brief, Quismundo concedes that the proper remedy at trial should have been dismissal without prejudice.2 He asks this court to so order now. Supp'l Br. of Pet'r at 7, 13. Likewise, the State concedes that because the first amended information was constitutionally defective, the proper remedy at trial should have been dismissal without prejudice. But for a variety of reasons discussed below, the State argues that the trial court properly allowed the State to reopen its case and amend the insufficient information. We disagree.

Under our state constitution, it is a "constitutionally mandated rule that all essential elements of a charged crime must be included in the charging document." Vangerpen, 125 Wn.2d at 788. The essential elements rule recognizes a defendant's "article [I], section 22 . . . right to demand the nature and cause of the accusation against him or her." Id. at 789. In a criminal case, once the prosecution

2 Quismundo explains that trial counsel likely misread State v. Pelkey, 109 Wn.2d

484, 745 P.2d 854 (1987), when he requested dismissal with prejudice. Although that was the remedy in Pelkey, it was appropriate there because of a mandatory joinder violation, which is not present in this case. Supp'l Br. of Pet'r at 14 n.3; see also State v. Dallas, 126 Wn.2d 324, 327-33, 892 P.2d 1082 (1995) (explaining that the difference in remedy between Pelkey and Vangerpen was based on the joinder issue in Pelkey).

has rested, it may not amend an insufficient information.

> In State v. Pelkey, 109 Wn.2d 484, 491, 745 P.2d 854 (1987), this court held that an information may not be amended after the State has rested its case in chief unless the amendment is to a lesser degree of the same crime or a lesser included offense. Any other amendment is deemed to be a violation of the defendant's article [I], section 22 . . . right to demand the nature and cause of the accusation against him or her.

Id. Instead, the proper remedy is dismissal of the charge without prejudice. Id. at 792-93. Moreover, where an information is deemed insufficient in such a context, the defendant need not show prejudice to effect dismissal; the insufficiency alone is

enough to warrant dismissal. Id. at 790.

The trial court here should have dismissed the charges against Quismundo without prejudice once the insufficiency of the first amended information was revealed; on this point the parties agree. Supp'l Br. of Pet'r at 13; Supp'l Br. of Resp't at 5. The question now is whether its failure to do so was an abuse of discretion warranting reversal of Quismundo's conviction.

A court abuses its discretion when an "order is manifestly unreasonable or based on untenable grounds." Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). A discretionary decision "is based 'on untenable grounds' or made 'for untenable reasons' if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (emphasis added)

(quoting State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)). Indeed, a court "would necessarily abuse its discretion if it based its ruling on an erroneous

view of the law." Fisons, 122 Wn.2d at 339.

Here, the trial court based its ruling on an erroneous view of the law and therefore abused its discretion. The trial court believed that it could dismiss without prejudice to the State only if Quismundo showed that the insufficient information prejudiced him. RP at 90-91. This is incorrect under Pelkey and Vangerpen. Pelkey, 109 Wn.2d at 491; Vangerpen, 125 Wn.2d at 790. Moreover, the remedy the trial court selected was unavailable under Vangerpen. "We have repeatedly and recently held that the remedy for an insufficient charging document is reversal and

dismissal of charges without prejudice to the State's ability to refile charges,"

Vangerpen, 125 Wn.2d at 792-93, not midtrial amendment and refiling. We hold

the trial court abused its discretion in ordering the remedy it did. To hold otherwise

would invite erosion of the clear rule in Pelkey and Vangerpen.3

The State argues, and the Court of Appeals agreed, that because Quismundo

himself requested an erroneous remedy -- dismissal with prejudice -- the trial court

did not abuse its discretion in rejecting that remedy. Supp'l Br. of Resp't at 10-11;

Quismundo, 2007 Wash. App. LEXIS 576, at *4. The question is not whether the

trial court properly refused dismissal with prejudice, however, but whether it abused

its discretion in allowing amendment of the insufficient charging document after the

3 The State suggests that double jeopardy concerns prevented the trial court from dismissing without prejudice, apparently because such dismissal would likely have been over Quismundo's objection given that he believed the correct remedy was dismissal with prejudice. Supp'l Br. of Resp't at 9. As we recognized in Vangerpen, however, "[t]here

is no double jeopardy bar to retrial after a reversal necessitated by a defective charging document." Vangerpen, 125 Wn.2d at 793 n.19; State v. Markle, 118 Wn.2d 424, 439-41, 823 P.2d 1101 (1992).

State had rested its case. The abuse of discretion standard does not allow us to excuse an order based on an erroneous view of the law because the trial court considered and rejected an equally erroneous argument.4

Finally, the State appears to argue that Quismundo invited the error himself by going forward with his trial on the second amended information and cannot now ask for dismissal without prejudice. Supp'l Br. of Resp't at 10-11. But at the point at which Quismundo withdrew his continuance request, the trial court had already erred and Quismundo's actions at that point have no bearing on the posture of this case.

A trial court's obligation to follow the law remains the same regardless of the arguments raised by the parties before it. Although Quismundo erroneously requested the wrong remedy for the insufficient charging document, under Pelkey and Vangerpen the trial court was precluded from allowing a midtrial amendment of the charges and was required to dismiss the charges without prejudice.

III

Conclusion

We hold that the trial court abused its discretion when it ordered a remedy

4 This case does not ask us to consider a situation in which a defendant validly waives his rights under Pelkey and Vangerpen. Quismundo clearly noted his objection to the trial court's denial of his motion to dismiss. RP at 103-04. That he erroneously asked for dismissal with prejudice rather that without prejudice does not amount to a waiver. We will find waiver only where a defendant voluntarily relinquishes a known right. City of Seattle v. Klein, 161 Wn.2d 554, 556, 166 P.3d 1149 (2007) (noting that "[t]he only means by which . . . an individual constitutional right in Washington may be relinquished

is by a voluntary, knowing, and intelligent waiver.").

that departed from clear precedent of this court. We remand this case to the trial court so that the charges against Quismundo can be dismissed without prejudice.

AUTHOR:

Justice Debra L. Stephens

WE CONCUR:

Chief Justice Gerry L. Alexander

Justice Susan Owens

Justice Charles W. Johnson

Justice Mary E. Fairhurst

Justice Barbara A. Madsen

Justice James M. Johnson

Justice Richard B. Sanders

Justice Tom Chambers